



EDITORIAL

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3 strikes and you're out of a job

Medical liability in the Sunshine State changed radically when 3 constitutional amendments won overwhelming approval in last fall's election. One amendment took a decisive step toward reforming a tort system that is out of control; the other 2 handed over more power to the plaintiff bar.

- 64% of voters favored a cap on plaintiff attorney contingency fees: 30% of the first \$250,000 and 10% of any award above \$250,000.
- 70% favored a law to prevent licensure of physicians who have "committed" 3 or more incidents of malpractice.
- 81% voted to allow patients to see records of adverse medical incidents, including all peer review and quality assurance committee documents.

The Academy of Florida Trial Lawyers opposed the limit on fees and backed Floridians for Patient Protection, the group that put the other amendments on the ballot.

Will plaintiffs sign away rights? The Florida Medical Association argues that the caps on fees will ensure that the majority of settlements go to the injured plaintiffs, not their attorneys, and will help slow skyrocketing liability insurance costs by curtailing frivolous and junk lawsuits. But some trial attorneys hope to skirt the new law via binding private agreements in which plaintiffs voluntarily sign away their constitutional right to 90% of any award over \$250,000, and assign more money to the attorney. Unless the plaintiff signs, some attorneys may not take the case.

Pressure to settle frivolous suits. Pretrial settlements do not count towards the "3 strikes and you're out" limit, but final court

judgments, regulatory agency decisions, and binding arbitration settlements do. (The amendment was intended to apply retroactively, but it is unclear whether that will happen.) The new rule pressures doctors to settle frivolous suits to avoid a possible "strike"—and a busy obstetrician practicing within the standard of care is likely to have 3 adverse claims over a 30-year career. For example, 40% of the approximately 1,050 obstetricians in Massachusetts have lost a suit or paid a settlement in the past 10 years.

These odds do not favor recruitment of obstetricians (or neurosurgeons or orthopedic surgeons). It would not be unreasonable to consider the stakes too high and the odds too risky to practice in Florida.

Will open records slow reforms? The amendment to open records concerning adverse incidents guarantees that peer review committees will be very cautious in their investigations and deliberations. Paradoxically, this may reduce patient safety by slowing medical systems reform.

A better way: MICRA. National legislation such as California's MICRA is the best alternative to complex, inconsistent state-by-state laws. Key features include limits on noneconomic damages, punitive damages, and contingency fees, prevention of double payments for the same expenses, allowance for damages to be paid in installments, a 3-year statute of repose, and a 1-year statute of limitations. The President and the House support MICRA. A litmus test of the new Congress will be the Senate's enthusiasm.

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FAST TRACK

In Florida, more power to the plaintiff (and the plaintiff bar) and a little tort reform